No. 96360-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY,

Appellant,

v.

KING COUNTY WATER DISTRICTS
Nos. 20, 45, 49, 90, 111, 119, 125, et al.,

Respondents.

AMES LAKE WATER ASSOCIATION, DOCKTON WATER ASSOCIATION, FOOTHILLS WATER ASSOCIATION, SALLAL WATER ASSOCIATION, TANNER ELECTRIC COOPERATIVE, and UNION HILL WATER ASSOCIATION,

Intervenor-Defendants.

APPELLANT KING COUNTY'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Washington Cases

Other State Cases

Washington Constitutional Provisions

Washington Statutes

Washington Ordinances

Washington Regulations

Washington Attorney General Opinions

Other Authorities

I. INTRODUCTION

Respondents Private Utility Corporations ("Private Utilities") freely admit that "RCW 36.55.010 authorizes counties to grant a franchise to a utility for use of county road ROW" and that "[n]o one challenges that proposition." Private Utilities' Br. at 31-32. No one, that is, except the Special Purpose Utility Districts ("District Utilities") who advance a "golden ticket" theory whereby RCW 57.08.005 trumps RCW 36.55.010, case law, and over a century of practice to grant them unfettered use of the right of way ("ROW") without limitation. Both groups of respondents (together "Utilities") present inconsistent, inapplicable, and internally contradictory arguments to reach the same self-serving destination: free use of the public ROW by ***any*** utility, including for-profit utilities operated exclusively for shareholder benefit. Under the guise of serving the public, the Utilities leave the public without any compensation for use of a public asset or any ability to control conflicting ROW uses through their county government.

By statute, local governments like Appellant King County control the public rights-of-way ("ROW") within their jurisdictions and possess the ***discretion*** to grant, or deny, franchises to secondary users of the roadway like utilities. By adopting Ordinance 18403, which conditions King County's assent to franchise issuance upon reasonable rental payments or other consideration for use of the ROW, the County acted consistently with more than a century of Washington law, federal law, and the general law of franchises. Indeed, multiple sections of the Washington Constitution provide that utilities may not utilize public assets for free, without regulation or in perpetuity.

As explained in King County's Opening Brief, this Court's decisions, RCW 36.55.010, and the County's home rule authority provide multiple independent grounds on which this Court should hold: 1) the County can require that utilities obtain franchises in order to operate in the public ROW; and 2) the County can condition its assent to a franchise upon the utility's agreement to pay reasonable rental compensation for use of the public ROW. The hodgepodge of other statutes and regulations the Utilities cobble together do not support their claim to free and unfettered use of public ROW, nor (as this Court has already held) does reasonable rental compensation in return for ROW use constitute a tax. The trial court's order should be reversed and the matter remanded with instructions to enter summary judgment for the County upholding Ordinance 18403.

II. ARGUMENT IN REPLY

A. RCW 36.55.010 ALLOWS THE COUNTY TO CONDITION A FRANCHISE ON THE PAYMENT OF REASONABLE RENTAL COMPENSATION.

The District and Private Utilities do not meaningfully respond, nor could they, to the plain language of RCW 36.55.010 or the long history of Washington municipalities conditioning use of the public ROW on rental compensation. *See* Opening Br. at 6-8, 28-29, 32-33. RCW 36.55.010, which has been in place since 1905, gives counties broad ***discretion*** ("may") to grant franchises for secondary use of the ROW by utilities. This Court has already determined that this statute establishes "no ***right*** to a franchise, unless the [County's] board determines that its operation will benefit the public," *State ex rel. York v. Bd. of Comm'rs of Walla Walla Cty.*, 28 Wn.2d 891, 909, 184 P.2d 577 (1947) (emphasis original), and repeatedly recognized that "a franchise is a valuable property right" where municipalities have historically "exacted compensation in the form of free services or a cash payment." *Burns v. City of Seattle*, 161 Wn.2d 129, 144, 164 P.3d 475 (2007). In long-accepted formal opinions, both the Washington Attorney General and the King County Prosecutor have said the same. *See* Opening Br. at 9, 24-26. The fact that the Legislature has never acted, over the course of more than a century, to limit a county's ability to condition the grant of a franchise on rental payment speaks volumes and counsels strongly against accepting the Utilities' claimed right to unfettered ROW use.

1. The County Can Require a Franchise for Use of its ROW.

The Utilities argue that franchises may be convenient if issued under terms the Utilities dictate, but are otherwise unnecessary to their continued use of county ROW. *See* Private Utilities' Br. at 32 (the statute "does not say that a county can ***require*** a utility to have a franchise…"); District Utilities' Br. at 43. But, in fact, the entire point of franchising authority is to ***authorize*** the utilities' use of ROW along county roads. The power to grant (or refuse to grant) a franchise is rendered meaningless if a utility may simply elect to use public ROW on its own terms without one.[1] There would be no purpose to RCW 36.55.010 unless franchises are necessary for utility operations in the ROW.

While the County cannot compel any entity to contract with it, the utilities also cannot compel the County to issue franchises that allow free and unconditioned use of a public asset. If utilities do not wish to enter a franchise agreement, they may decline to do so and, accordingly, locate their utilities outside public ROW on private property. *See Pac. Tel. &*

[1] Unsurprisingly and consistent with King County's position, other Washington counties require a franchise for utility use of the ROW, including water and sewer. *See, e.g.*, Pierce County Code §§ 12.32.014 – 12.32.105; Chelan County Code §§ 8.25.010 – 8.25.070; Cowlitz County Code §§ 12.21.020, 12.26.005 – 12.26.115.

Tel. Co. v. City of Everett, 97 Wash. 259, 267, 166 P. 650 (1917) ("the [franchise] charge could be avoided entirely by the simple process of moving the poles against which the charge is aimed from the streets and other public places of the city to private property").

It is pure hypocrisy for the Utilities to argue that the County cannot condition its assent to a franchise on payment of consideration without violating the Utilities' freedom to contract, but the Utilities can impose a franchise on the county with no payment terms (or any particular terms) whatsoever. *See City of Spokane v. Spokane Gas & Fuel Co*., 175 Wash. 103, 107, 26 P.2d 1034 (1933) ("The municipality may refuse to grant a franchise at all. If it grants a franchise, it may do so on its own terms, conditions, and limitations. The applicant's alternative is to accept the franchise as offered, or reject it as a whole."). The Utilities and the trial court erred by viewing issuance of a franchise as the default, when RCW 36.55.010 specifically leaves issuance to the County's sole discretion.

The Court of Appeals' decision in *City of Lakewood v. Pierce Cty.*, 106 Wn. App. 63, 23 P.3d 1 (2001), does not undermine the statute or the County's well-established franchise power, including its ability to refuse a franchise. Because franchise agreements are fundamentally contracts between the municipality and the utility, the *Lakewood* decision turns on the limits of contracting authority—namely that one side cannot unilaterally impose terms on the other when negotiations break down. The statute before the court was RCW 35A.47.040, which authorized code cities "to grant nonexclusive franchises for the use of public streets." *See Lakewood*, 106 Wn. App. at 67. The court construed the statute to allow the city to "grant," but not "require" a franchise. *Id*. at 73.[2] As such, it held that "[u]ntil both parties agree on terms, no franchise exists, and Lakewood may not compel the County to agree to its terms." *Id.* at 74.

The Utilities' claim that *Lakewood* allows their continued occupation of King County ROW without a franchise agreement—unless they decide to accept county terms that are inconvenient for them—goes well beyond the holding of the case. First, the court was not asked to reach, nor did it reach, whether the utility could continue to operate in the City's ROW if continued franchise negotiations were unsuccessful, or if the City demanded the utility's ejectment from the ROW.[3]

Second, any holding along the lines claimed by the Utilities would conflict with this Court's precedent and common sense. If the status quo ante to not reaching a franchise contract agreeable to the municipality is

[2] Rejecting an argument highly similar to one made by the District Utilities in this case, the court held that the City's franchise power applies to both private and publicly owned utilities. *Id.*

[3] This appeared to be a remote outcome because Lakewood was in the process of assuming control of the sewer utility, which would moot the issue. *See Lakewood*, 106 Wn. App. at 67 n.2 (pointing out that another pending action related to the transfer of the sewer system from the county to the city).

the utility's unfettered right to occupy the ROW in perpetuity, it is unlikely that further negotiations would ever prove fruitful or that a franchise agreement would ever be reached between the parties. A utility in these circumstances would have no motive to accede to franchise terms that it did not like because it was already receiving the full benefit of the franchise (occupation of the ROW).

The Utilities' misreading of *Lakewood* is based on a single, isolated sentence in the opinion: "A 'city cannot ... compel the [utility] to accept its terms for the continued occupation of the streets.'" 106 Wn. App. at 74 (quoting *Gen. Tel. Co. of the Nw., Inc. v. City of Bothell*, 105 Wn.2d 579, 586, 716 P.2d 879 (1986)). Consistent with this Court's authority, this means that a municipality cannot ***impose*** franchise contract terms for use of the ROW, not that the utility may do what it wishes in the right of way forever with the municipality unable to eject it.

The limits to this language are apparent when *General Telephone*—the sole basis for the sentence—is analyzed. In *General Telephone*, the authority cited for this sentence is the McQuillin treatise and *City of Detroit v. Detroit United Ry.*, 172 Mich. 136, 137 N.W. 645 (1912), *aff'd*, 229 U.S. 39, 33 S. Ct. 697, 57 L. Ed. 1056 (1913). Similar to this Court's precedent, McQuillin recognizes the general principle of franchise law that, without a franchise agreement in place, the franchise holder may be ejected from the ROW. *See* 12 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 34:73 (3d ed. updated July 2019). And in the *City of Detroit* case, the Michigan Supreme Court held that the failure of franchise negotiations rendered the utility a "trespasser" on city ROW and the municipality thus had "the absolute and unquestioned right at any time to compel the defendant company to vacate the streets upon which these franchises have expired, and to require it to remove its property therefrom within a reasonable time." 172 Mich. at 158. In sum, neither *Lakewood* nor any decision of this Court supports the Utilities' claim that they can refuse to enter into or comply with a franchise agreement yet retain untrammeled access to the public ROW.

Finally, the Utilities are wrong that the nature of the County's real property interests is insufficient to require franchise agreements for ROW use. While the County does own some ROW in fee, the Legislature and this Court have already determined that the issue is not fee ownership but the County's pervasive and exclusive control over the ROW (including the ability to allow secondary uses). *See York*, 28 Wn.2d at 897-98, 903. Per RCW 36.55.010, the sole authority to enter into franchises providing for a utility's use of the ROW rests with the County. Where a party desires non-utility uses of the ROW that fall outside the County's RCW 36.55.010 franchise authority, the County has the sole authority to rent or lease ROW for non-utility purposes. *See* RCW 36.75.040(5).[4] As such, though nominally an enhanced form of "easement" akin to fee ownership, the County's control over the ROW is far more extensive than a typical private easement and closely equates to fee ownership.[5] Thus, the County has "entire control of its streets and the power to impose conditions on granting a franchise to use the streets," including "compensation for their use by public service companies." [6] 12 MCQUILLIN, *supra*, § 34:57; *see also* 4 EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 1624, at 3395-96 (1st ed. 1912) ("In determining whether a municipality has the power to grant to a public utility company the right to use a street or streets, ***it is wholly immaterial whether the municipality owns the fee in the soil over which the streets are laid out,***

[4] This statute is further evidence of the Legislature's acknowledgment that the County's interest in the ROW is sufficient to justify consideration for its beneficial use by others.

[5] The railroad cases cited by the Private Utilities do not hold otherwise. The County's act of seeking reasonable rental compensation for utilities' use of a public ROW does not compare to the appropriation of mineral rights at issue in *Great Northern Railway Co. v. United States*, 315 U.S. 262, 62 S. Ct. 529, 86 L. Ed. 836 (1942) and *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 77 S. Ct. 685, 1 L. Ed. 2d 693 (1957). And in *Union Pacific Railroad Co. v. Santa Fe Pacific Pipelines, Inc.*, 231 Cal. App. 4th 134, 180 Cal. Rptr. 3d 173 (2014), the court held that the railroad at issue lacked sufficient property rights in the servient estate to allow it to grant property interests thereto, and further held that the railroad's lease of the subsurface was not justified as a "railroad purpose." *Id*. at 166-70. That holding was based on Congressional acts specific to railroads and does not apply here. In contrast to the statutes at issue in *Santa Fe*, here the Legislature has granted counties explicit authority to grant property interests (franchises) in the ROW.

[6] Another way to understand the nature of county control of ROW along county roads is by examining the nature of any reversionary interest held by adjacent land owners. As this court explained in *Kiely v. Graves*, 173 Wn.2d 926, 939, 271 P.3d 226 (2012), "fee interests subject to public easements may be considered mere future expectancies, bereft of enjoyment and incapable of pecuniary advantage" (quotations omitted).

or only an easement" (footnotes omitted; emphasis added)); *Erie Commc'ns, Inc. v. City of Erie*, 659 F. Supp. 580, 594-95 (W.D. Penn. 1987) (regardless of city's possessory interest in public streets, city was entitled to condition use of ROW on payment of rental fee: "[A]s a city holds the streets in trust for the public, it would be a dereliction of a city's fiduciary duty to grant franchise rights, particularly where the grant acts to exclude other members of the public, without receiving the fair market value for the property"). This control, together with the County's statutory and constitutional authority, is sufficient to require a franchise agreement for use of the County's ROW.[7]

2. The County's Authority to Obtain Compensation is Inherent in its Franchise Authority.

The Utilities' acknowledgement that a franchise is a contract necessarily requires consideration, which is part and parcel of all contracts. As elaborated in the County's opening brief, the United States and Washington Supreme Courts and the Washington Attorney General have all expressly recognized the authority of counties and cities to condition assent to franchise issuance upon payment of reasonable rent or

[7] *See* 4 MCQUILLIN, *supra*, § 1614, at 3359 ("[A] franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security.").

other consideration. This is true regardless of the specific real property interest held in the ROW. *See* Opening Br. at 24-31 (citing *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 97, 105, 13 S. Ct. 485, 37 L. Ed. 380 (1893); *City of Spokane*, 175 Wash. at 106-07; *City of Everett*, 97 Wash. at 267-69; *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 278-79, 142 P.2d 498 (1943); 1977 Op. Att'y Gen. No. 19, 1977 WL 25965, at *1).

Time and again, this Court has confirmed the "historic[]" practice of municipal exaction of "compensation in the form of free services or a cash payment" in exchange for the grant of a franchise, stating unequivocally that a municipality "may require compensation for the use of the public streets as a condition for granting a franchise, unless forbidden by statute or contrary to public policy." *Burns*, 161 Wn.2d at 144; *see also* 4 MCQUILLIN, *supra*, § 1613, at 3356 ("[I]nstead of giving away franchises without consideration, the tendency is to protect fully the interests of the municipality, both for the present and the future, and to preserve the right to regulate the operations of the grantee of the franchise, for the protection of the municipality and its inhabitants against the possible greed of the grantee…."). [8] Rather than respond to these

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[8] The Utilities' suggestion that conditioning assent to use of the ROW upon payment of consideration is unprecedented is belied both by these authorities and by the record in this case, which indicates the Utilities routinely pay other jurisdictions compensation "[i]n

authorities, the Utilities claim that they are all "dicta," "inapposite," or lack "serious analysis." None of these labels are accurate.

Ignoring *St. Louis*, which established the principle of charging rent for the ROW, the Private Utilities claim that this Court's discussion of rental compensation in *City of Spokane*, *City of Everett*, and *Pac. Tel. & Tel. Co.* is "dicta." *See* Private Utilities' Br. at 24-30. But in each case, this Court's evaluation of the nature of the rental charge was central to its holding. For example, in *City of Spokane*, a significant portion of the Court's opinion was devoted to explaining that if a municipality grants a franchise, it may require payment of reasonable compensation. 175 Wash. at 106-09 (collecting cases). Similarly, in *City of Everett*, the nature of the charge was critical to whether the ordinance at issue could be sustained as an exercise of the city's police powers, taxing authority, or other authority. 97 Wash. at 265-67. This Court emphasized that a charge in the nature of rent for the use of public streets may lawfully be collected in conjunction with a franchise agreement. *Id*. at 267-69.[9] Finally, in *Pac. Tel. & Tel.*

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consideration of the rights granted under the franchise." *See* CP 1850 (Highline Water District paid an annual "Franchise Payment" to the City of Normandy Park in the amount of 4% of its annual revenue derived from the provision of retail water service in 2018, rising to 6% in 2019); CP 1878-80 (King County Water District No. 111 pays the City of Kent 6% of its annual revenue in consideration of the City's forbearance from charging any other type of tax or a rental fee); CP 1913-15 (same between Southwest Suburban Sewer District and City of Des Moines); CP 1940 (Woodinville Water District paid the City of Kirkland $1.73 per foot of ROW used as of 2011, adjusted annually for inflation).

[9] Contrary to the Private Utilities' claims, this Court also did not term the franchise charge at issue a "tax." *See id*. at 266-68; *see also City of Spokane*, 175 Wash. at 108 ("A

Co., this Court differentiated between payments to municipalities under franchises and payments made pursuant to municipal taxing ordinances for purposes of determining whether certain payments should be classified as general operating expenses. Noting that a franchisee's ability to use a public street "is a privilege for which a cash payment may reasonably be exacted," the Court concluded, "It seems reasonable to consider that payment of a certain proportion of respondent's gross income collected from rate payers within the city limits be considered as ***compensation for use of the streets***" that would properly be classified as a general operating expense. 19 Wn.2d at 278-79 (emphasis added). Thus, the Court explicitly passed on both the nature and propriety of such payments.

The District Utilities likewise fail to address any of these cases other than to claim they are "inapposite" because they relate to "***for profit*** utilities that do not otherwise have a statutory right to locate their facilities in the public rights-of-way."[10] District Utilities' Br. at 23 & n.9 (emphasis

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charge imposed in a franchise is not a tax or a license."). This argument by the Utilities is further addressed *infra*, Section II.E.

[10] Contrary to the District Utilities' claim, this Court has not distinguished between for-profit/private and nonprofit/public entities where the franchise power is concerned. This Court has recognized that the franchise authority applies generally to "public utilities." *See Wash. Fruit & Produce Co. v. City of Yakima*, 3 Wn.2d 152, 157-58, 100 P.2d 8 (1940), *adhered to on reh'g*, 3 Wn.2d 152, 103 P.2d 1106 (1940) (a franchise "connotes the right of a public utility to make use of the city streets for the purpose of carrying on the business in which it is generally engaged, that is, of furnishing service to of the public generally."); *Burns*, 161 Wn.2d at 143-44 (same and noting that "[a] city may require compensation for the use of the public streets as a condition for granting a franchise, unless forbidden by statute or contrary to public policy."); *State v. Pub. Util. Dist. No. 1*

original). To the contrary, *City of Everett* involved a telephone and telegraph company. 97 Wash. at 260. At that time, such companies had the authority to "construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street or highway." Laws of 1889-90, ch. IX, § 5, p. 292. Similarly, in *St. Louis*, the company sought to occupy city streets under a federal statute granting the authority to "construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States." 148 U.S. at 100. The Supreme Court described that act as a "permissive statute" that carried "no exemption from the ordinary burdens which may be cast upon those who would appropriate to their exclusive use any portion of the public highways." *Id*. at 102. The same is true here.

In their only other attempt to distinguish substantively these binding cases, the Utilities argue (without support) that these precedents apply only to cities. Given the equivalence in city and county franchise powers as of the early 1900s, there is no basis for the Utilities' attempted distinction. *See* Opening Br. at 32-33. As detailed in the County's

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of Clark Cty., 55 Wn.2d 645, 647-49, 349 P.2d 426 (1960); *see also City of Lakewood*, 106 Wn. App. at 73. Such an approach is not surprising given that the county franchise statute, RCW 36.55.010, explicitly applies to "persons or private or municipal corporations." The District Utilities are certainly "municipal corporations" within the meaning of that statute.

Opening Brief, city and county franchise powers were co-extensive until the Legislature acted to limit ***city*** (but not county) franchise power in 1982. *See* Laws of 1982, 1st Ex. Sess., ch. 49 ("1982 Act"). Neither the Private nor the District Utilities meaningfully address this point. The Private Utilities speculate, without citation, that legislative silence as to county franchise authority could mean the Legislature understood counties had no right to require franchise fees in the first instance. But the Legislature is presumed to know the state of the law. *See Jametsky v. Olsen*, 179 Wn.2d 756, 766, 317 P.3d 1003 (2014). The Private Utilities' argument further ignores the longstanding practice of local governments charging franchise fees—a practice affirmed and reaffirmed by this Court and the Attorney General's Office. *See* Opening Br. at 1, 5-6, 8-10, 24-26, 28-31. Given this history, the Legislature had no basis to conclude in 1982 that cities had franchise fee authority but counties did not.

The District Utilities further label the 1982 Act "irrelevant" because it allegedly relates only to "utilities that do not already have a statutory franchise." District Utilities' Br. at 47. Although their so-called statutory franchise argument fails, see *infra*, Section II.C, it turns out that the 1982 legislation did impact telephone companies, which also have statutory authority to operate in the ROW. *See* Laws of 1982, 1st Ex. Sess., ch. 49, § 2 (barring cities and towns from imposing franchise fees upon “the light and power, ***telephone***, or gas distribution businesses” (emphasis added)). In 1982, telephone companies were authorized to “construct and maintain all necessary lines of…telephone for public traffic along and upon any public road, street or highway,” *see* Laws of 1961, ch. 14, § 80.36.040. Thus, under the District Utilities’ logic, there would have been no reason for the Legislature to include telephone companies within the 1982 Act’s scope due to their alleged “statutory franchise,” but the Legislature affirmatively removed the power of cities to impose franchise fees on telephone companies while leaving the county statute intact. Because only city franchise powers were limited in 1982, counties continued to enjoy the same pre-1982 franchise powers that are described in the case law and that were held by all Washington cities and counties prior to the 1982 amendments.

In sum, Ordinance 18403 is consistent with the longstanding and lawful county regulation and control of the public ROW via the franchise authority, and payment of compensation by utilities for use of that ROW. Nothing in the Utilities’ briefs compels departure from this well-established legal framework. The trial court should be reversed.

B. THE ORDINANCE IS A VALID EXERCISE OF THE COUNTY'S HOME RULE AUTHORITY.

The County's constitutional power as a home rule charter county further and independently supports its enactment of Ordinance 18403. In response, the Utilities claim: 1) because one statute, RCW 36.75.020, refers to the County as an "agent of the state", the County lacks sufficient control over the ROW to require franchise agreements and charge rental compensation; 2) the Ordinance conflicts with general law; and 3) the Ordinance exceeds the County's home rule authority because regulation of County ROW is not a local concern. None of these arguments support the trial court's order.

First, as a threshold matter, contrary to the Utilities' claim, nothing in RCW 36.75.020 restricts any county's franchise power under RCW 36.55.010. As detailed above, all counties have long possessed franchising authority in their own right, without qualification as "an agent of the state." Moreover, whereas RCW 36.75.020 empowers non-charter counties to act as agents of the state for county road purposes, nothing in that statute diminishes a charter county's home rule power to control its ROW. *See King Cty. Council v. Pub. Disclosure Comm'n*, 93 Wn.2d 559, 562, 611 P.2d 1227 (1980) ("Although the powers of many public officials are limited to those expressly granted, this principle does not apply to a home rule county council."); *see also* 1996 Op. Att'y Gen. No. 17, 1996 WL 576958, at *2 n.2 (home rule charter counties have broader powers than those expressly granted by statute). Thus, the County retains broad control over its laws and operations, limited only by the state constitution or statutes. *See King Cty. Council*, 93 Wn.2d at 562-63; *Henry v. Thorne*, 92 Wn.2d 878, 881-82, 602 P.2d 354 (1979).

Regardless of the Utilities' claim that the County was not specifically empowered to enact the Ordinance, the proper question for a charter county is whether the Ordinance is expressly prohibited. *See Sw. Wash. Chapter, Nat'l Elec. Contractors Ass'n v. Pierce Cty.*, 100 Wn.2d 109, 123, 667 P.2d 1092 (1983) (charter county "has powers as broad as the State, except where expressly limited"). The Utilities cite no statute that clearly and expressly prohibits the Ordinance, nor is there one.

This Court has routinely analyzed home rule authority under a conflict preemption standard. *See Henry*, 92 Wn.2d at 881-82 (uniform approach to filling county elective office vacancies not constitutionally required); *Snohomish Cty. v. Anderson*, 123 Wn.2d 151, 155-59, 868 P.2d 116 (1994) (home rule referendum rights conflicted with state statutory scheme "and thus would extend beyond a matter of local concern").[11]

[11] *See also Whatcom Cty. v. Brisbane*, 125 Wn.2d 345, 353-55, 884 P.2d 1326 (1994) (home rule charter provisions that conflict with legislative intent must yield); *State ex rel. Guthrie v. City of Richland*, 80 Wn.2d 382, 383-88, 494 P.2d 990 (1972).

"[A] state statute preempts an ordinance on the same subject if the statute occupies the field, leaving no room for concurrent jurisdiction, or if a conflict exists such that the statute and the ordinance may not be harmonized." *Lawson v. City of Pasco*, 168 Wn.2d 675, 679, 230 P.3d 1038 (2010).[12]

The Oregon Court of Appeals recently applied a similar analysis. In *Rogue Valley Sewer Servs. v. City of Phoenix*, 262 Or. App. 183, 329 P.3d 1 (2014), *aff'd*, 357 Or. 437, 353 P.3d 581 (2015), a sanitary authority challenged a city ordinance that imposed an annual five percent franchise fee on the sanitary authority's gross revenue. *Id*. at 185-86. Like the Utilities here, the sanitary authority claimed the city's fee was invalid unless specifically authorized by an express grant of authority from the legislature. *Id*. at 188. The court disagreed, noting that "the question is not whether the city can identify an express statutory authorization for the franchise fee…but whether the city was prohibited from imposing the fee by state or federal law." *Id*. at 191.

As in *Rogue Valley*, the Utilities here point to no statute where the Legislature has "expressly limited" King County's authority to condition

[12] *Cf. Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 897, 83 P.3d 999 (2004) (in federal context, forms of preemption include express preemption, field preemption, and conflict preemption). A statute preempts the field and invalidates a local ordinance "if there is express legislative intent to preempt the field or if such intent is necessarily implied." *Lawson*, 168 Wn.2d at 679.

its grant of a franchise on the willingness of a utility to pay reasonable rental compensation. ***This failure is fatal to their position.*** Indeed, the District Utilities admit that the applicable statutes are “silent as to rent.” District Utilities’ Br. at 41. The Private Utilities similarly concede this point. Private Utilities’ Br. at 30-32. The trial court based its ruling on statutory omission. CP 2269-70, 2283. But this is legal error. For charter counties, the lack of an express limit in the statutes authorizes King County’s exercise of its broad charter authority to adopt Ordinance 18403.

Second, the Ordinance does not conflict with any general law. As detailed below, the Ordinance does not conflict with the Public Districts’ “statutory franchise” rights because no such rights exist. *See infra*, Section II.C.[13] Nor does the Ordinance conflict with plat dedications to the public. *See infra*, Section II.D.2. Likewise, RCW 36.75.040(5) presents no conflict with the Ordinance because it merely allows for the rental or lease of ROW for purposes independent of the franchise statute.[14]

[13] In fact, the Utilities continue to argue on appeal that there is no conflict between RCW 36.55.010 and RCW 57.08.005. *See* District Utilities’ Br. at 44. Since, as established in the County’s Opening Brief, RCW 36.55.010 encompasses and always has encompassed the discretionary authority to grant and deny franchises and set their terms and conditions, the Utilities’ concession of no conflict is an acknowledgement that RCW 57.080.005 does not preclude the County from exercising this authority. *See* Opening Br. at 20-31. The Ordinance was enacted in part pursuant to this authority. *See* CP 267 (Ordinance 18403, § 1.B).

[14] It is unlikely that the Utilities desire or advocate for application of RCW 36.75.040(5) to them. The result would be the invalidation of any utility uses of the ROW that were not established by competitive bid. Of course, this statute addresses the powers of county commissioners and is not binding on charter counties, which do not follow the

The franchise statute, RCW 36.55.010, addresses county franchise power and presents no conflict with the Ordinance.

Third, the Utilities' argument attempting to limit charter powers to issues of "local concern" misses the point. Although this Court has sometimes described home rule authority in terms of governing "local affairs," *see Henry*, 92 Wn.2d at 881, that is simply another way of saying that home rule charter counties may act in areas that do not conflict with the state constitution or statutes. *See* Const. art. XI, § 4 (authorizing county home rule charters "subject to the Constitution and laws of this state"). Regardless, county roads and the use and regulation thereof are issues of uniquely local concern.[15] *See State v. City of Spokane*, 24 Wash. 53, 59-62, 63 P. 1116 (1901); *State ex rel. Schroeder v. Super. Ct. of Adams Cty.*, 29 Wash. 1, 6, 69 P. 366 (1902).[16] Here, the Utilities cite no relevant statute or constitutional provision expressly or impliedly prohibiting the County from requiring a franchise for use of the ROW and

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commissioner form of government. For charter counties, such statutes provide an option to further exercise lawful county authority but do not limit the exercise of charter powers.

[15] *Chemical Bank v. Washington Public Power Supply System*, 99 Wn.2d 772, 666 P.2d 329 (1983), cited by the Utilities, is not remotely analogous to this case. In *Chemical Bank*, this Court held that the development of nuclear generating facilities through the joint efforts of 88 participants from Washington and five other states—including cities, public utility and irrigation districts, and rural electric cooperatives—was a subject of "at least joint state and local interest." *Id*. at 777, 793-94. The large-scale, multijurisdictional, highly regulated nuclear project in *Chemical Bank* is a far cry from payment of rent in exchange for utility use of local public ROW.

[16] *See also* 4 MCQUILLIN, *supra*, § 1613, at 3357; *York*, 28 Wn.2d at 898; *Rounds v. Whatcom Cty.*, 22 Wash. 106, 108-09, 60 P. 139 (1900).

conditioning its assent to such franchise upon consideration. Nor do they identify any state law with which the Ordinance expressly conflicts.[17] The Ordinance thus falls well within the scope of the County's home rule authority. Accordingly, the County's constitutional home rule authority is an additional and alternative basis for upholding Ordinance 18403.

C. RCW 57.08.005 IS NOT A GOLDEN TICKET THAT OVERRIDES RCW 36.55.010, PRECEDENT AND CHARTER POWERS.

It is at this point that the District and Private Utilities part company. The District Utilities claim that RCW 57.08.005—a statute that has no application to Private Utilities—somehow operates to preempt the County's franchising and charter powers. Relying on an incomplete citation to RCW 57.08.005, the District Utilities assert they have a statewide "independent statutory right" to use County ROW without so much as permission, let alone a franchise agreement or payment of reasonable compensation. *See* District Utilities' Br. at 22. The implications of this argument go well beyond Ordinance 18403; accepting it would invert the longstanding relationship between local general government (here, the County), which holds the ROW in trust for the

[17] The state statutory and regulatory scheme regarding accommodation of utilities on public ROW in no way limits county control over public ROW and in fact contemplates the exercise of the county franchise power as discussed *infra*, Section II.D.1.

general public, and secondary users of the ROW like utilities, which are subject to County regulation and oversight.

Importantly, the District Utilities offer the "statutory franchise" theory as their sole response to virtually all of the independent grounds offered by King County in support of the Ordinance, thus effectively conceding that if this Court rejects their expansive interpretation of RCW 57.08, numerous grounds to sustain the Ordinance will stand unrebutted. Moreover, the District Utilities' insistence that chapter 57.08 RCW defeats the County's franchising authority further emphasizes that the Private Utilities in particular have no claim to be in the ROW without a franchise. In short, while RCW 57.08.005 enables the District Utilities to acquire rights in the ROW, it neither empowers them to occupy the ROW without a franchise from the County, nor exempts them from paying reasonable rental compensation. The trial court's order interpreting RCW 57.08.005 to supersede the County's franchise authority should be reversed.

1. RCW 57.08 Neither Grants the Districts Property Rights in the ROW nor Authorizes its Use Without a Franchise.

As an initial matter, the issue here is not whether the Legislature has the power to grant franchises (within constitutional limitations) for use of public ROW. Rather, the issue is whether the Legislature intended to and did grant such a franchise (to the exclusion of any county or city franchise) in enacting RCW 57.08.005. The answer is no.

The District Utilities go wrong at the outset by misconstruing their statutory "powers" as "rights." Special purpose districts are limited to the powers set forth in their enabling statutes. *See Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 788, 357 P.3d 1040 (2015) (special purpose district "is limited in its powers to those necessarily or fairly implied in or incident to the powers expressly granted, and also those essential to the declared objects and purposes of the corporation" (quotations omitted)). The powers conferred in RCW 57.08.005 merely authorize the District Utilities to locate facilities and acquire rights of way, but establish no pre-eminent use of county ROW. The statute represents the ***authority*** to work toward these ends, not the ***right*** to use ROW that state law specifically places in the exclusive control of the County.[18]

Notably, the statute does not grant any ***property rights*** in the ROW. To the contrary, RCW 57.08.005 expressly requires and authorizes such districts to ***acquire*** the property rights necessary to occupy the ROW.

[18] The District Utilities confuse the difference between a "right" to do something and the authority to engage in an undertaking. They claim that RCW 57.08.005(3) and (5) grant them "an independent statutory ***right*** to construct, operate and maintain their water and sewer facilities within all county rights-of-way." District Utilities' Br. at 22 (emphasis added). Although the statute never speaks in terms of a "right," they persist throughout their briefing in claiming a "statutory ***right*** to use County roads and rights-of-way." *Id.* (emphasis added).

See RCW 57.08.005(5) ("[A] district may conduct sewage throughout the district and throughout other political subdivisions within the district, and construct and lay sewer pipe along and upon public highways, roads, and streets, within and without the district, ***and condemn and purchase or acquire land and rights-of-way necessary for such sewer pipe***" (emphasis added)); *see also* RCW 57.08.005(3) (similar for waterworks). The District Utilities misleadingly and tellingly omit the emphasized language in quoting the statute in their brief. *See* District Utilities' Br. at 22. Because it is necessary for districts to condemn, purchase or acquire just like anyone else, it is hardly the so-called "statutory franchise" they claim.[19]

The statute is further limited by application of "general law." In RCW 57.08.005(3), the District Utilities are granted the power to "construct, condemn and purchase, add to, maintain, and supply waterworks to furnish the district and inhabitants thereof and any other persons, both within and without the district, with an ample supply of water for all uses and purposes public and private with full authority to

[19] Although the District Utilities acknowledge RCW 57.08.005's requirement regarding acquisition of property rights, they claim these references relate only to areas not within public ROW. *See* District Utilities' Br. at 45-46. The text of the statute does not support such a limitation. *See* RCW 57.08.005(5). Instead, the statute authorizes districts to acquire "all lands, property and ***property rights***…necessary for [their] purposes" but does not exempt public ROW from the types of property rights that may be obtained. RCW 57.08.005(1) (emphasis added); *see also* RCW 57.08.005(3), (5).

regulate and control the use, content, distribution, and price thereof ***in such a manner as is not in conflict with general law*** and may construct, acquire, or own buildings and other necessary district facilities." (Emphasis added). One such general law, of course, is the county franchise statute, RCW 36.55.010, which applies to "private or municipal corporations."[20] Another general law is the accountancy statute, which requires a special district to reimburse other government entities for the use of their assets. RCW 43.09.210.

Even the section of RCW 57.08.005(3) the District Utilities read in isolation hardly creates a statutory franchise. Referring back to the section that references application of general law, the statute goes on to state, "For such purposes, a district may take, condemn and purchase, acquire, and retain water ***from any public or navigable lake, river or watercourse, or any underflowing water***, and by means of aqueducts or pipeline conduct the same throughout the district and any city or town therein ***and carry it along and upon public highways, roads, and streets, within and without such district***." *Id*. (emphasis added). Rather than an unfettered statutory right to use county ROW without payment, this section is limited to

[20] There is no colorable basis for the District Utility's claim that the franchise statute applies only to some municipal corporations, not them. No rule of statutory construction supports denying application of the statute's plain language. *See HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451-52, 210 P.3d 297 (2009) (discussing plain meaning analysis).

transmitting certain sources of water. The authority to "carry it along and upon" public roads nowhere implies, specifies or expressly states "without a franchise under RCW 36.55.010 or payment for the use of the ROW."

For public sewer districts, the case for a statutory franchise is even worse. RCW 57.08.005(5), the sentence that provides basic authority to "construct and lay sewer pipe along and upon" public roads, also requires that districts "condemn, purchase or acquire land and rights-of-way necessary for such sewer pipe." Nothing about this statute overrides the County's right to require a franchise, including payment of compensation, for utility use of the ROW.

The folly of the District Utilities' "statutory franchise" is further apparent by reference to other statutes. When the Legislature intends to authorize use of the public ROW without the requirement of a franchise, it explicitly so states in the statute. *See* RCW 35.58.330 (granting metropolitan municipal corporations the power to locate facilities in public ROW "***without first obtaining a franchise from the county or city having jurisdiction over the same***" (emphasis added)). Such language would be consistent with the express preemption requirements noted above, but no such language excusing the District Utilities from franchise requirements appears in RCW 57.08.005 or any other statute. *See United Parcel Serv.*, *Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984) (different language evidences different legislative intent).

2. No Washington Law Supports the District Utilities' Expansive Interpretation of RCW 57.08.005.

The District Utilities cite no Washington authority holding that RCW 57.08.005 (or any other similar statute) grants a "statutory franchise" to use county ROW without obtaining a county franchise. The handful of Washington cases the Districts cite do not support that position either. *City of Tukwila v. City of Seattle*, 68 Wn.2d 611, 414 P.2d 597 (1966) and 1968 Op. Att'y Gen. No. 32, 1968 WL 90987, involved ***specific*** franchises adopted by local ordinance, not general rights purportedly conveyed by statute.

And *State ex rel. Walker v. Superior Court for Spokane Cty.*, 87 Wash. 582, 152 P. 11 (1915), further supports the ***County's*** position, not the Utilities.' There, this Court addressed the interplay between a statute granting telephone corporations the right to locate their facilities along any public street (which the Utilities here would argue grants a "statutory franchise") and a statute granting first class cities certain powers with respect to control and use of city streets. *Id*. at 585-86. Citing its decision in *State ex rel. Tacoma v. Sunset Tel. & Tel. Co.*, 86 Wash. 309, 150 P. 427 (1915), this Court emphasized that the city franchise power arose from the latter statute. *Id*. at 586-88. The Court also reiterated *Tacoma*'*s* language rejecting the argument that the general telephone statute repealed city franchise authority with respect to telephone franchises. *Id*. at 587. In other words, the Court ***rejected*** the premise that legislation enabling telephone companies to locate in the right of way preempted the city's franchising authority.

Nor does this Court's decision in *State ex rel. Washington Water Power Co. v. Superior Court for Grant Cty.*, 8 Wn.2d 122, 111 P.2d 577 (1941), support the District Utilities' claim of a "statutory franchise." There, the statute at issue was similar to RCW 57.08.005(3) and (5) in that the rights granted to the public utility districts to place lines in the ROW were qualified by subsequent provisions authorizing the districts to acquire by purchase or condemnation necessary property or property rights. *See id.* at 130-31. In other words, neither the statute in *Washington Water Power Co.* nor RCW 57.08.005 grants utilities a franchise to use the ROW, but rather empowers them to obtain the necessary property rights they require via purchase or otherwise.[21]

[21] The concurrence in *Washington Water Power Co.* correctly described this premise, namely that "***public utility districts must receive right of way or franchises from the owners of public highways, roads and streets, over and upon which they desire to extend their lines***." 8 Wn.2d at 135-36 (Jeffers, J., concurring) (emphasis added).

At best, the District Utilities claim an implied statutory franchise. This is not enough to overcome the express preemption necessary to override King County's charter powers.

3. The Out-of-State Cases Relied Upon by the Districts Do Not Support Their Broad Interpretation of RCW 57.08.

Perhaps recognizing that no Washington authority supports their position, the District Utilities turn for the first time to out of state decisions. *See* District Utilities' Br. at 27-34. Not only are the Utilities' cases distinguishable, but other out-of-state cases are more closely analogous and support the County's position.[22] Importantly, out of state decisions do not account for the special constitutional and statutory provisions that inform Washington law.

As an initial matter, two of the Utilities' out-of-state authorities do not even involve a broad statutory grant of authority to occupy the ROW. To the contrary, in *Public Service Corp. of New Jersey v. De Grote*, 70 N.J. Eq. 454, 62 A. 65 (1905), the court traced the gas company's authority to lay pipes in the ROW to: (1) a special state charter,[23] and (2) an 1898 village ordinance. *Id*. at 461-65. And the statute at issue in *Corpus Christi v. Southern Community Gas Co.*, 368 S.W.2d 144, 146-47,

[22] These authorities are also, of course, not binding on this Court. *See Quadrant Corp. v. Am. States Ins. Co*., 154 Wn.2d 165, 184, 110 P.3d 733 (2005).
[23] There is no claim in this case that any of the Utilities fall within the terms of any such historic charter.

(Tex. Civ. App. 1963), merely exempted companies with preexisting facilities from obtaining a city franchise for 10 years after city incorporation.

To the extent the remainder of the Utilities' out-of-state authorities involved broad statutory grants of authority, the statutes in those cases were not akin to RCW 57.08.005; i.e., did not contain qualifying language regarding obtaining the necessary property rights to occupy the ROW. *See Michigan Pub. Serv. Co. v. City of Cheboygan*, 324 Mich. 309, 318-20, 324, 37 N.W.2d 116 (1949) (company had vested rights under statute authorizing construction of electric facilities in public streets; court did not specifically address whether city could still require a franchise or payment of compensation); *City of Petaluma v. Pac. Tel. & Tel. Co.*, 44 Cal.2d 284, 286, 288-89, 282 P.2d 43 (1955) (statute authorized telephone and telegraph companies to construct facilities along and upon public roads); *City of Englewood v. Mountain States Tel. and Tel. Co.*, 163 Colo. 400, 405-06, 431 P.2d 40 (1967) (in holding that telephone company had right to locate its facilities in the public ROW without obtaining city franchise, court emphasized that a statewide telephone system was "a matter of statewide concern heavily outweighing any possible municipal interest," as distinguished from “a city gas or electric company operation whose predominant epicenter usually is limited to a local focus.”).[24]

Moreover, some of the Utilities’ out-of-state cases actually support the County. For example, the *Corpus Christi* Court confirmed the “settled” principle that “a city has the authority, where authorized by its own charter, to make a street rental charge as consideration for granting a franchise.” 368 S.W.2d at 147. And in *Englewood*, the court reaffirmed that if no “state franchise” existed, the municipality has the power to require one—which is exactly the County’s argument here. *See* 163 Colo. at 406-07.

Regardless, to the extent this Court considers cases from other states on this issue, it should look to more apt authorities. For example, in the recent Oregon franchise case cited above, the court rejected the sanitary authority’s claim that its enabling legislation created a statutory right to operate without a franchise, *Rogue Valley Sewer Servs.*, 262 Or. App. at 194 (“What the statutes demonstrate is the legislature’s intention to constrain the powers of sanitary authorities to those conferred in the act. What is wholly lacking from that statutory scheme is any apparent

[24] The Utilities at issue here are in the latter category.

legislative intention to restrict or limit a city's power to regulate a sanitary authority's use of public rights-of-way.").

Similarly, in *Farmers' Telephone Co. of Quimby v. Town of Washta*, 157 Iowa 447, 133 N.W. 361 (1911), the Iowa Supreme Court rejected an argument similar to the one the District Utilities make here. That case involved (1) a statute authorizing telephone and telegraph companies to construct lines and other facilities along public ROW and (2) legislation empowering cities to "authorize and regulate" such facilities and to provide the manner and places in which they may be erected. *Id*. at 364. The court emphasized that care and control of streets came within the local domain, and that public utility and private users "have been quite generally expected to obtain the permission of and comply with the reasonable terms imposed by the city or town":

> To say now that, notwithstanding [the city franchise statutes], the streets of such municipality are open to the entrance of every person or corporation which may be minded to try its hand at the maintenance of a telephone system, without permission of the constituted authorities or the approval of the voters is to nullify the legislative enactment. On the other hand, by treating [the general authority granted to telephone companies] as stating a general rule, which must be read and applied with due reference to limitations imposed by other statutes relating to the same subject all may be given due effect.

Id. at 364-65; *see also Pawhuska v. Pawhuska Oil & Gas Co.*, 28 Okla. 563, 115 P. 353, 354-55 (1911) (gas company claimed unlimited authority to operate in city streets under a 1909 statute authorizing such companies to locate facilities in the public ROW, but the court declined to interpret the statute as "a grant of a perpetual blanket franchise to every domestic pipe line corporation, as to every town or city of the state").

Here, the Legislature has passed (1) a general statute enabling public water-sewer districts to locate facilities in the ROW and to acquire the necessary property rights to do so; and (2) statutes granting counties both broad control over the ROW and the specific power to grant (or deny) franchises and set terms and conditions for utility use of the same. *See* RCW 57.08.005; RCW 36.75.020; RCW 36.75.040(4); RCW 36.32.120(2); RCW 36.55.010. Interpreting Title 57 to require water-sewer districts to obtain the necessary property right (a franchise) in order to occupy the ROW gives effect to the Legislature's scheme as a whole, and preserves the County's proper authority over the ROW.[25] Under the County's interpretation, which also comports with the plain language, the statutes are harmonized.

[25] The District Utilities do not even address the "sibling rivalry" cases cited in the County's Opening Brief, which address intersections of authority between different units of government. *See Olympic View Water & Sewer Dist. v. Snohomish Cty*., 112 Wn.2d 445, 448-49, 772 P.2d 998 (1989); *City of Everett v. Snohomish Cty*., 112 Wn.2d 433, 440-43, 772 P.2d 992 (1989). Those cases also support the County's harmonization argument. *See* Opening Br. at 40-42.

By contrast, the District Utilities' expansive and unprecedented interpretation of RCW 57.08.005 creates rather than resolves a conflict with the County's statutory franchise rights. Elevating the Utilities' enabling legislation into a "statutory franchise" would allow any public water-sewer district to make use of the public ROW without a franchise—thus eviscerating the County's primary means of controlling such uses as well as its statutory and historical control of the ROW. Given the remainder of the statutory scheme governing county roads, that cannot be what the Legislature intended.[26]

4. A Perpetual "Statutory Franchise" Violates the Washington Constitution and the Accountancy Act.

The District Utilities' remaining "statutory franchise" arguments similarly fail. First, article I, section 8 of the Washington Constitution precludes the Legislature from granting a franchise without an end date. Interpreting RCW 57.08.005 as a "franchise" would do just that. *See Brauer v. Iroquois Gas Corp.*, 381 N.Y.S.2d 166, 169 (1975) (if a

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[26] "Liberal construction" does not help the District Utilities here, because this is not an issue of construction. *See* District Utilities' Br. at 14. As noted above, there is no language in chapter 57.08 indicating that water-sewer districts have authority to use county ROW for their facilities without a franchise or payment of compensation. Further, the Legislature's express delegation of control over the ROW and grant of franchise authority to counties weigh against the Districts' contention that the Legislature intended to give them carte blanche with respect to use of county ROW. *See King Cty. Water Dist. No. 75 v. Port of Seattle*, 63 Wn. App. 777, 785-86, 822 P.2d 331 (1992) (rejecting water district's "liberal construction" argument where no statutory language supported its claim of exclusive authority to provide water services and other statutes indicated to the contrary).

franchise is silent as to duration, its existence is perpetual); 1968 Op. Att'y Gen. No. 32, 1968 WL 90987, at *3 (perpetual grant of franchise is unconstitutional). The District Utilities claim that the right cannot be viewed as permanent because the Legislature could revoke or modify it at any time, but even if that were so it would still constitute an indefinite franchise that would violate the constitution.[27] Article I, section 8 was enacted to assure that the government could not grant perpetual utility rights. *See* 1968 Op. Att'y Gen. No. 32, 1968 WL 90987, at *1 n.1.

Second, the District Utilities offer no explanation of how their theory would satisfy the accountancy statute, RCW 43.09.210.[28] They claim without citation to authority that the County is not providing the Utilities with "services" and, alternatively, that reimbursing the County for its administrative costs "clearly satisfies" the accountancy statute's requirement of "true and full value." District Utilities' Br. at 41. But the

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[27] The cases cited by the Utilities do not require a different conclusion. *Neils v. City of Seattle*, 185 Wash. 269, 53 P.2d 848 (1936) does not address article I, section 8 at all. The case involved legislative withdrawal of the grant of franchise ***power*** to cities, not (as the Utilities claim) legislative withdrawal of a statutory franchise. *Id*. at 274-76. And while the Colorado Supreme Court in *Englewood* determined that a statutory right to use the streets did not violate Colorado's equivalent of article I, section 8, the case contained no discussion of the nature of franchises nor the contractual impairment implications of the ruling. Regardless, the case is inconsistent with Washington's Constitution. *See* Const. art. I, § 23; *City of Everett*, 97 Wash. at 270-71.

[28] The Private Utilities also claim RCW 43.09.210 does not "require utilities to pay rent to the County for use of public ROW" because the County does not "own" the ROW. *See* Private Utilities' Br. at 38. The County has not claimed that RCW 43.09.210 applies to private entities. Regardless, the Private Utilities' argument fails for the same reasons discussed *supra*, Section II.A.1.

accountancy statute requires reimbursement not only where "services" are rendered, but also where "property [is] transferred" from one governmental entity to another. RCW 43.09.210(3). Franchises for use of public ROW grant "valuable property right[s]." *See City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 592, 269 P.3d 1017 (2012); *Burns*, 161 Wn.2d at 144. This fact alone invokes the accountancy act and renders the District Utilities "statutory franchise" untenable.[29]

For all of these reasons, this Court should reject the District Utilities' claim of a "statutory franchise."[30]

D. NO OTHER AUTHORITY SUPPORTS FREE ROW USE.

The Utilities cite various statutory and regulatory provisions they assert give them the right to occupy public ROW without a franchise or compensation, but none are on point. To the contrary, these provisions either do not address ROW use at all or contemplate the well-established exercise of county franchise authority.

[29] By definition, the franchise application fee that the County charges to cover "administrative costs incurred by the county in the reviewing and processing of the franchise application" (*see* CP 270 (Ordinance 18403, § 6)) does not cover the valuable property used for utility operations.

[30] The District Utilities' misinterpretation of RCW 57.08.005 is also evident from their concession that the County may "recover its costs associated with administering its franchise program." District Utilities' Br. at 10 n.4. They make this concession to avoid a collision with the *Lakewood* decision they otherwise espouse. But in reality, the District Utilities' concession that payment for administrative fees is a proper way to read RCW 36.55.010 consistent with RCW 57.08.005 also leaves payment for rent available. No colorable reading of the two statutes allows the Utilities to pick and choose which forms of compensation they would rather pay.

1. Statutes and Regulations Governing Standards of Good Practice Do Not Supersede County Franchise Authority.

The Utilities rely on RCW 36.78.070(1) and its corresponding regulations to claim the county must “accommodate” utility use. RCW 36.78.070(1) authorizes the county road administration board to establish by rule “standards of good practice for the administration of county roads and the efficient movement of people and goods over county roads.” Neither chapter 36.78 RCW nor its corresponding regulations empower utilities to operate in public ROW without a franchise agreement or for free. Rather, the cited regulations specifically envision franchise agreements. *See*, *e.g.*, WAC 136-40-010, -020. Nothing about this scheme undermines the County’s franchise authority.

2. Statutory Dedications to the Public Accrue to King County, Not the Utilities.

The Utilities claim that notwithstanding the County’s broad authority over and interest in the ROW, plat dedications “to the public,” “for all public purposes,” or similar phrasing should accrue to utility districts, including private for-profit enterprises. District Utilities’ Br. at 54-56; Private Utilities’ Br. at 34-35. Of course, the statutes authorize counties to accept plats and hold roads in trust for the public. *See* Chapter 58.17 RCW. No such privilege is granted to utilities.

Plat dedication language "to the use of the public…for all public purposes" creates a public easement held in trust by the local government of general jurisdiction—here, the County. *See York,* 28 Wn.2d at 897-98. Such language does not grant the District Utilities an easement right to use the ROW, nor does it make them "intended beneficiaries." *See Hanford v. City of Seattle*, 92 Wash. 257, 260, 158 P. 987 (1916) (grantee must be named or specifically indicated in dedication). The District Utilities are special purpose municipal corporations with powers limited to those expressly granted by statute or necessarily implied from granted powers. *See* RCW 57.04.060; *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 569-72, 980 P.2d 1234 (1999); *Wash. Pub. Util. Dists.' Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam Cty.*, 112 Wn.2d 1, 6, 771 P.2d 701 (1989). Their use of the ROW is "a use different in kind and extent from that enjoyed by the general public," and thus dedication to the "public" does not grant an easement to such districts and does not permit use of public ROW without authorization and reasonable compensation to the public as a whole. *See St. Louis*, 148 U.S. at 98-99.[31]

[31] Water-sewer districts operate for the benefit of their paying customers, not the general public. *See, e.g., Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003) (regarding a municipal electric utility: "The electric utility operates for the benefit of its customers, not the general public….A utility will not provide electricity to a customer that does not request service.").

The Private Utilities' argument regarding dedication is even more startling, as they cite no authority explaining how they and other private entities (such as Puget Sound Energy) are included within the "public" to which the ROW is dedicated. The Private Utilities even claim that they are "public utilities" because they serve the public. *See* Private Utilities' Br. at 4 n.4. Circular reasoning aside, the Private Utilities at issue here are "private utilities" under Washington law. *See* RCW 36.94.010(5) (private utilities are utilities which are not municipal corporations); RCW 36.94.010(4) ("'Municipal corporation' means and includes any city, town, metropolitan municipal corporation, any public utility district which operates and maintains a sewer or water system, any sewer, water, diking, or drainage district, any diking, drainage, and sewerage improvement district, and any irrigation district.").

The Utilities' reliance on the statutory scheme governing plat dedication, RCW chapter 58.17, is also misplaced. These statutes simply (1) reiterate that dedication is "to the ***public***," not to individual water-sewer districts or other utilities, and (2) state the chapter's general purpose to regulate subdivision of land in order to promote public health and safety goals. *See* RCW 58.17.165 (emphasis added); RCW 58.17.020(3); RCW 58.17.010. For similar reasons, the Private Utilities' reliance on King County Code (K.C.C.) provisions governing plat dedication falls short.

See K.C.C. 19A.08.150-.160; K.C.C. 19A.16.040-.050. These provisions set out application, minimum improvement, and engineering plan review requirements for plats and site plans. Although the provisions reference water and sewer mains and "easements for rights-of-way provided for public utilities," the Code does not specify where those mains or easements should be located or grant use of public ROW for the same. *See* K.C.C. 19A.08.160.A.2; K.C.C. 19A.16.050.I.

Nor do the cases the Utilities cite require a different conclusion. This Court's decision in *Northwest Supermarkets, Inc. v. Crabtree*, 54 Wn.2d 181, 338 P.2d 733 (1959), supports the County, not the Utilities. There, a storm sewer system was installed within the streets in a platted area, and the streets were subsequently dedicated to public use. *Id*. at 182. This Court noted that "the ***county*** alone would have the right to object" to installation of a storm sewer in a dedicated street. *Id*. at 185 (emphasis added). In *North Spokane Irrigation District No. 8 v. Spokane Cty.*, 86 Wn.2d 599, 547 P.2d 859 (1976), the plat dedication at issue ***specifically reserved for the dedicators*** the right to lay and maintain water pipes within the public ROW. *Id*. at 600. Here, neither the District nor the Private Utilities point to specific language reserving a right to locate utility facilities in favor of themselves or their predecessors.[32] *See Cummins v. King Cty*., 72 Wn.2d 624, 626-27, 434 P.2d 588 (1967). Again, dedications to the "public" accrue to the ***County*** as the local general government. *See Bunnell v. Blair*, 132 Wn. App. 149, 153-54, 130 P.3d 423 (2006) (suggesting county road statute would apply if road within plat had been dedicated to public use).[33] Thus, dedications to the public neither establish easement rights benefiting specific utilities (much less private utilities), nor empower utilities to operate for free in the ROW.

3. County Road Regulations Do Not Support Free ROW Use.

The Utilities next claim that Section 1.04 of the County's "Regulations for Accommodation of Utilities on County Road Rights-of-Way" ("Regulations") indicates franchises are not necessary. That section states, "All Utilities with facilities within King county road rights-of-way, ***whether or not the Utility holds a franchise from King County***, shall comply with these Regulations and with all applicable federal, state and

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[32] Even if dedicatory language refers generally to utility service as an intended purpose of the dedication, that is not an explicit reservation of rights to occupy the ROW without a franchise or payment of compensation. If specific portions of County ROW in fact explicitly reserve such rights for utilities, *see* Private Utilities' Br. at 34, that issue would properly be raised during individual compensation negotiations, but does not impair the County's overarching authority. *See* CP 1273 (Rule RPM 9-2, § IV.1.1); CP 1235-36.

[33] *See also* 1952 Op. Att'y Gen. No. 307, 1952 WL 44921, at *1 ("When the county commissioners by appropriate action approve a proposed plat without reservation concerning the roads designated therein, those roads become county roads."); *Holmquist v. King Cty.*, 182 Wn. App. 200, 207-08, 328 P.3d 1000 (2014) (King County held right-of-way easement interest arising from dedication to public use); *Gillis v. King Cty*., 42 Wn.2d 373, 380, 255 P.2d 546 (1953) (county holds interest in dedicated streets in trust for the public).

local laws, codes, rules and regulations including, but not limited to, the general references set forth in Section 1.02 of these Regulations." CP 433 (emphasis added). This language says nothing about whether and when franchises are required. Indeed, several utilities in this case have remained in the ROW with expired franchises, which is part of the reason for the Ordinance's enactment. *See* CP 804-05, 1152, 1248. The Regulations as a whole also make clear that franchises should be required to occupy public ROW. *See* CP 437 (defining "franchise" as "occupancy and use document granted by the County ***required*** for occupancy of road rights-of-way in accordance with RCW 36.55, RCW 80.32 and King County Codes 6.27, and 6.27A"); *see also* CP 458 (first step is obtaining a franchise).[34]

4. The Private Utilities Have No Authority to Operate in the ROW Without a Franchise and Their Additional Challenges to the Ordinance Fail.

The Private Utilities now concede that RCW 57.08.005 does not grant them ***any*** rights with respect to the ROW. *See* Private Utilities' Br. at 8. Nor have they identified any other legal authority justifying their use of the ROW without a franchise or payment of compensation. *See supra*,

[34] Moreover, at the time these Regulations were adopted in 1997, the King County code required franchises, but allowed for waiver of this requirement for the purpose of issuing emergency right-of-way construction permits. *See* King County Ordinance No. 11790, § § 1, 2 (May 25, 1995), *available at* https://aqua.kingcounty.gov/council/clerk/OldOrdsMotions/Ordinance%2011790.pdf (last visited July 26, 2019).

Sections II.D.1-3. They instead invoke a patchwork of statutes and regulations they contend undermine the County's franchise authority over private parties. None of their arguments withstands scrutiny.

The Private Utilities cite chapter 70.116 RCW and its corresponding WAC provisions (chapter 246-293 WAC), but neither addresses location of utility facilities, much less purport to give utilities the right to locate facilities in county ROW without a franchise or payment of compensation. Similarly, WAC 173-240 implements RCW 90.48.110, which relates to Department of Ecology review for the construction, improvement, or extension of sewerage systems. *See* WAC 173-240-110. The Private Utilities throw in RCW 19.27.097 (which requires an adequate water supply for a building permit), but that statute similarly does not purport to grant free use of the ROW to private utilities.[35]

There is equally no merit to the Private Utilities' claim that King County has improperly modified existing franchise agreements. First, whether the Ordinance and Rule contravene certain individual contracts is, again, irrelevant to the County's ***general*** authority to charge franchise

[35] Nor do the cited King County Code provisions, K.C.C. Chapter 13.24, authorize utilities to locate their facilities in any particular place, much less in the ROW, without a franchise or compensation. These ordinances pertain to water and sewer comprehensive plans for utilities that provide water or sewer service in unincorporated King County, and specifically contemplate that such entities will have franchises for use of the ROW. *See* K.C.C. 13.24.010.A.3.

rental compensation (the subject of this appeal). Second, King County reserved the right to exercise whatever authority it had or may acquire to require payment of fair market compensation or other charges for the use of its property pursuant to an ordinance. CP 1248, 1573, 1596-97, 1614-15, 1629-30, 1645-50. As such, no improper "unilateral modification" has occurred.[36] *See Nye v. Univ. of Wash.*, 163 Wn. App. 875, 886, 260 P.3d 1000 (2011) (no improper modification where contract provisions allowed for change); *see also City of Tacoma v. Boutelle*, 61 Wash. 434, 440, 112 P. 661 (1911); 4 MCQUILLIN, *supra*, § 1670, at 3515 ("[T]he municipality may exercise any powers in relation to the franchise which have been reserved to it by the franchise itself.").[37]

5. Free Unfettered Use of the ROW By the Private Utilities is a Gift in Violation of the Washington Constitution.

The private utilities subject to Ordinance 18403 range from small customer-owned cooperatives to multimillion dollar corporations.

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[36] The remainder of the reservation of rights clause (Private Utilities' Br. at 46) states that the franchisee reserves the right to challenge the legality of any such action by the County. Contrary to the Private Utilities' claim, the franchise agreements do not require the franchisees to "accept whatever new 'franchise compensation' payment obligations the County might try to force upon them." Private Utilities' Br. at 47. Nor is the Private Utilities' characterization of the forbearance provisions of the Ordinance accurate. The trial court upheld the forbearance provision, consistent with this Court's holding in *Burns*, and that portion of the order has not been challenged on appeal. CP 2283-84.

[37] In *City of Everett*, this Court held that the city could not impose a charge on the franchisee's poles erected in city streets after the franchise had already been granted. 97 Wash. at 269. But in doing so, the Court noted that the right to exact such a charge was not one of the "enumerated terms and conditions" in the existing franchise. *Id*.

Regardless, these private corporations have no right to use the "valuable property right" that is the public ROW for their own personal business and profit. This is exactly the concern that motivated article VIII, section 7 of the Washington Constitution, which prohibits the gift of municipal property. *See City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 701-02, 743 P.2d 793 (1987). In claiming a right to free use of the public ROW, the Private Utilities offer nothing beyond their own self-interest that would remotely satisfy our state constitution.

Unfettered, and uncompensated, ***private*** use of public ROW is legally unjustifiable, and has been since the adoption of the Washington Constitution. *See* Const. art. VIII, § 7; art. I, § 8. The trial court must be reversed on this additional ground.

E. ORDINANCE 18403 DOES NOT IMPOSE A TAX FROM WHICH THE UTILITIES ARE IMMUNE.

1. The County's Franchise Rental Compensation Charge Is Not a Tax.

The Utilities also fail in their attempt to characterize the County's Franchise Rental Compensation charge as a tax. Quite simply, a reasonable rental charge for the use of a valuable public asset is not a tax.[38] This Court has already determined, on more than one occasion, that

[38] The actual rental charge under the Ordinance is determined through a negotiation process. The Utilities suggest in briefing that King County has issued them a bill, but it is only an initial "ask" in the negotiation process based on the over-the-fence appraised

franchise rental compensation is not a tax. *City of Spokane*, 175 Wash. at 108 ("A charge imposed in a franchise is not a tax or a license. It is not imposed under the sovereign power of taxation or police regulation."); *City of Everett*, 97 Wash. at 267 (franchise charge was not a tax and was "more in the nature of a charge for the use of property belonging to the city—that which may properly be called rental." (quotations omitted)).

Along the same lines, the Supreme Court of California recently addressed the validity of franchise compensation where a utility company, as part of a franchise agreement allowing it to use city ROW for its facilities, remitted two percent of its gross receipts to the city. *See Jacks v. City of Santa Barbara*, 3 Cal. 5th 248, 254-55, 397 P.3d 210 (2017). The plaintiffs in *Jacks* were ratepayers who claimed the franchise fee was a tax for purposes of Proposition 18, which required voter approval for all local taxes. *Id*. at 256, 259. The court explained that a franchise is a form of property and a franchise fee is the price paid for the franchise, which historically had not been considered a tax. *Id*. at 262, 267. The court held that nothing in Proposition 18 indicated legislative intent to "treat amounts paid in exchange for property interests as taxes." *Id*. at 267. And finally, the court explained that the utility's "receipt of an interest in public

value of the ROW actually used by the utility. Other provisions of the rule limit the rent that King County may charge in order to avoid undue impact on utility customers. *See* CP 297 (Rule RPM 9-2, § IV.2.4); *see also* CP 1233-34.

property justifies the imposition of a charge on the recipient to compensate the public for the value received." *Id*. Accordingly, charges reflecting a reasonable estimate of the value of the franchise were not taxes. *Id*.[39]

The Utilities' claim that Franchise Rental Compensation is a tax also begs the broader question in this case, because if the County has the authority to charge Franchise Rental Compensation (which it does for the reasons elaborated above), then doing so cannot amount to unlawful taxation unless the compensation is essentially a sham, which it obviously is not in the present case. Consistent with this Court's guidance in *City of Everett*, the County's charge is not "graduated by the amount of the business, nor is a sum fixed for the privilege of doing business." 97 Wash. at 267. Rather, the County's Franchise Rental Compensation is calculated using a methodology "consistent with appraisal practices and standards" that determines "compensation owed for the use of public rights-of-way."

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[39] *See also City of Plant City v. Mayo*, 337 So.2d 966, 973 (Fla. 1976) (franchise charges are "bargained for in exchange for specific property rights relinquished by the cities" and are not taxes); *Berea Coll. Utils. v. City of Berea*, 691 S.W.2d 235, 237 (Ky. 1985) (characterizing franchises as involving "valuable rights of the citizens" and noting the "common conclusion" that franchise compensation is "not a tax, but is instead a charge bargained for in exchange for a specific property right, i.e., rental or compensation for use of public streets"); *City of Lancaster v. Briggs*, 118 Mo. App. 570, 96 S.W. 314, 315 (1906) (use of municipal property is subject to municipality's "power to impose a money charge as a condition to the enjoyment" of the property, and such charge is not a tax but rather a sale or rental of necessary portions of the streets for the purpose of carrying on a business); *City of Baker v. Montana Petroleum Co*., 99 Mont. 465, 44 P.2d 735, 736 (1935) (franchise fees are not taxes, but rather "in the nature of rental or compensation for the use of streets"); *City of Dallas v. F.C.C.*, 118 F.3d 393, 397-98 (5th Cir. 1997) ("Franchise fees are not a tax…but essentially a form of rent: the price paid to rent use of public right-of-ways.").

CP 1234-35. The methodology was developed after extensive and careful study to assure it fairly and accurately captured the value of the ROW in use. CP 1231-36. The Utilities, therefore, fail to establish that Franchise Rental Compensation is a tax masquerading as a rental charge.

Even if this Court were to reexamine this issue, it should reaffirm that Franchise Rental Compensation is not a tax. As this Court recognized in *City of Snoqualmie v. King Cty. Exec. Dow Constantine*, 187 Wn.2d 289, 299, 386 P.3d 279 (2016): "Not all demands for payment made by a governmental body are taxes." (Quotations omitted). Particularly when a municipality is charging rent for the use of property, the *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995) test for determining whether a charge is a tax or regulatory fee "is too limited because it was not designed to account for the full spectrum of other government charges—some of which will be neither taxes nor regulatory fees." *Snoqualmie*, 187 Wn.2d at 300 (citing Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 352 (2002-2003)). Rather than recognizing that not all government charges neatly fit into the tax vs. regulatory fee dichotomy, the Utilities seek to impose that dichotomy on this case. That is, they argue that Franchise Rental Compensation is not a regulatory fee and, thus, must be a tax. *See, e.g.*, District Utilities' Br. at 17-18; Private Utilities' Br. at 47-48. The Utilities are wrong.

This Court need not categorize the County's Franchise Rental Compensation as a specific type of governmental fee.[40] In *Snoqualmie*, this Court held it is appropriate to apply a "broader version of the *Covell* factors" when answering the broader question of whether a charge is a tax, as opposed to answering the narrower question of whether a charge is a tax or a regulatory fee. 187 Wn.2d at 300-01.[41] This Court identified these broader factors as "'the purpose of the cost, where the money raised is spent, and whether people pay the cost because they use the service.'" *Id*. at 301 (quoting *Lane v. City of Seattle*, 164 Wn.2d 875, 882, 194 P.3d 977 (2008)).[42] Applying this broader version of the *Covell* factors here provides an alternative basis for the Court to reaffirm that Franchise Rental Compensation is not a tax.

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[40] "Regulatory fees are only one subset of user charge, which is a broad term that describes other types of charges such as commodity charges, burden offset charges, and special assessments." *Snoqualmie*, 187 Wn.2d at 300; *see also Burns*, 161 Wn.2d at 145, 161(recognizing existence of forbearance fees, a municipal charge that is neither a tax nor a regulatory fee); Spitzer, *supra*, at 352 (noting that "[r]egulatory fees are only one variety, a rather narrow variety, of user fees"); 16 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 44:24 (3d ed. updated July 2017) (acknowledging existence of different types of municipal fees).

[41] As the *Snoqualmie* Court observed, the broader *Covell* factors track the principles underlying the traditional *Covell* test without forcing a charge into the "two-category dichotomy of governmental charges." 187 Wn.2d at 300. Thus, to the extent a charge does not constitute a tax using the broader version of the *Covell* test, a charge also would not constitute a tax under the traditional version of the test, as the same principles apply.

[42] The Utilities cite *Watson v. City of Seattle*, 189 Wn.2d 149, 160-61, 401 P.3d 1 (2017), for the proposition that this Court "recently reaffirmed" the traditional three-part *Covell* test, but ignore that *Watson* is a straightforward tax vs. regulatory fee case. *See* Private Utilities' Br. at 47; District Utilities Br. at 19.

Under the first factor, "the purpose of the cost," Franchise Rental Compensation is not a tax because its purpose is to compensate the County for the Utilities' use of the ROW. Franchise Rental Compensation therefore resembles the charge in *Snoqualmie*, which compensated the county for use of its services. *See* 187 Wn.2d at 301; *see also* 16 MCQUILLIN, *supra*, § 44:24 (describing type of user fee that "is assessed for the use of the governmental entity's property or services"). To support their assertion that Franchise Rental Compensation is a tax, the Utilities rely entirely on the claim that the purpose of the charge is to raise revenue. District Utilities' Br. at 18; Private Utilities' Br. at 47. As the *Snoqualmie* Court acknowledged, however, "all governmental charges are generally imposed to raise revenue." 187 Wn.2d at 301. Here, the purpose of Franchise Rental Compensation is not solely revenue generation untethered to any service or property used by the Utilities. Rather, Franchise Rental Compensation corresponds to the value of the County's property used by the Utilities. *See* CP 1230-36. Accordingly, this factor shows that Franchise Rental Compensation is not a tax.

The second factor, "where the money raised is spent," also does not support the determination that Franchise Rental Compensation is a tax. In *Snoqualmie*, this Court determined that although the money was deposited into the general fund, it essentially reimbursed the government for the services rendered. 187 Wn.2d at 301-02; *see also Dean v. Lehman*, 143 Wn.2d 12, 30-31, 18 P.3d 523 (2001) (allocation of collected revenues to the general fund "does nothing to detract from the fact that the overall scheme…is to 'reimburse' the state for its 'costs of incarceration.'"); *Jacks*, 3 Cal. 5th at 268 (because fees paid for an interest in government property constituted compensation for the use or purchase of a government asset, the revenue generated by the fee "is available for whatever purposes the government chooses rather than tied to a public cost."). Here, Franchise Rental Compensation also is deposited into the general fund, but is intended to reimburse the County for use of its ROW property. *See* CP 1230-36. In any event, this Court has recognized that where funds are deposited "alone is not dispositive." *Covell*, 127 Wn.2d at 885.

Finally, the third factor, "whether people pay the cost because they use the service," supports the conclusion that Franchise Rental Compensation is not a tax. The District Utilities assert that Franchise Rental Compensation "is not intended to reimburse the County for anything." *See* District Utilities' Br. at 19. To the contrary, "[b]ecause a franchise is a valuable property right," any compensation in exchange for a franchise is "'in the nature of rental for the use and occupation of the streets.'" *Burns*, 161 Wn.2d at 144 (quoting *City of Spokane*, 175 Wash.

at 108).[43] As in *Snoqualmie*, 187 Wn.2d at 302, the methodology used to estimate the Franchise Rental Compensation, as well as the negotiation process that occurs between King County and the utility in reaching an agreement, supports the conclusion that payment is made in exchange for the valuable property right received. *See* CP 1273-76; *see also* CP 1235. Because the estimate of compensation for each utility is based on property value, it accounts for the unique characteristics of each ROW. *See id.*; *see also Snoqualmie*, 187 Wn.2d at 302. Accordingly, even if the *Covell* factors apply in this context, all of them would support the prior determination that the Franchise Rental Compensation is not a tax. *See City of Everett*, 97 Wash. at 267-68.[44]

Finally, the Utilities return to *City of Lakewood* for the premise that any rental compensation in excess of the County's administrative costs must be a tax. *See* District Utilities' Br. at 20; Private Utilities' Br.

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[43] *See also City of Tacoma*, 173 Wn.2d at 590 (a "franchise agreement grants a valuable property right to the grantee to use the public streets"); *Pac. Tel. & Tel. Co.*, 19 Wn.2d at 278-79; *City of Everett*, 97 Wash. at 267-68; CP 267 (Ordinance 18403, § 1.D (finding that, through continued use of King County's ROW, utilities are allowed to benefit "in a manner not generally available to the public")).

[44] The Private Utilities also assert that Franchise Rental Compensation is a "hidden tax" prohibited under article VII, section 5 of the Constitution because it is "buried in higher utility rates." Private Utilities' Br. at 49. But the County directly charges the Utilities for using the County's property as part of a negotiated franchise agreement. *See* CP 1248-50. To the extent that the Utilities pass that cost along to their ratepayers, the County is not a part of that decision or the question of how the Utilities establish their rates. *See also supra*, footnote 37 (Rule RPM 9-2 limits rent that can be charged to avoid undue impact on utility customers).

at 30-31. The *Lakewood* decision does not specifically hold that a franchise rental compensation charge constitutes an impermissible tax. In fact, the Court of Appeals noted that a franchise fee is "in the nature of rental for the use and occupation of the streets." *Lakewood*, 106 Wn. App. at 77 (citing *City of Spokane*, 175 Wash. at 108). The Court of Appeals then concluded that the franchise fee at issue, which was designed to recover administrative costs, was permissible, but in dicta observed that "a fee exceeding these costs would be impermissible" under *Covell. Id*. at 79.[45] Importantly as to this reference, *Lakewood* was decided before *Snoqualmie,* and subsequent commentators describe *Lakewood* as a "muddled case" that is "constrained by…thinking that places every governmental charge into one of two boxes." Spitzer, *supra*, at 359.

Regardless, this Court has expressly upheld charges by municipalities that exceed the administrative costs associated with the issuance of a franchise, even for cities. *See, e.g.*, *Burns*, 161 Wn.2d at 144 (franchise is a "privilege for which cities, historically, have exacted compensation in the form of free services or a cash payment"); *City of Tacoma*, 173 Wn.2d at 592 (upholding agreement to trade franchise rights

[45] In its complaint, the City of Lakewood sought nothing more than "to negotiate a franchise fee reflective of its full costs and the full impacts to its streets and rights of way in connection with" the sewer utility. *Lakewood*, 106 Wn. App. at 67. Thus, since the city was only seeking to recover costs, the case has nothing to do with the recovery of rental compensation.

for water system); *City of Spokane v. Spokane Gas & Fuel Co.*, 182 Wash. 475, 484-85, 47 P.2d 671 (1935) (authorizing city's charge for utility's use of city streets based on percentage of gross receipts). Consistent with these principles, the record in this case demonstrates that many utilities are currently paying franchise fees in excess of administrative costs, and have done so for decades. *See* CP 1850 (percentage of annual revenue derived from provision of retail water), 1878-80 (percentage of revenue in consideration of city's forbearance from charging other type of tax or rental fee), 1913-15 (same), 1940 (charge per foot of ROW used). To the extent that *Lakewood* actually supported the Utilities tax argument, it would conflict with this Court's precedents and should be overruled.

2. The Utilities Are Not Immune from Paying Franchise Rental Compensation.

The District Utilities also incorrectly claim that, as municipal corporations, they are immune from payment of Franchise Rental Compensation.[46] This claim depends entirely on the argument that Franchise Rental Compensation is a tax, and should fail on that basis alone. *See* District Utilities' Br. at 15 (arguing the Legislature must expressly delegate taxing authority to municipal corporations); Sections II.E.1 and II.A.2, *supra*. Even then, the governmental immunity doctrine

[46] As private entities, the Private Utilities do not and cannot claim governmental immunity.

applies only when a municipality seeks to tax another municipality acting in its governmental as opposed to proprietary capacity. *City of Wenatchee v. Chelan Cty. Pub. Util. Dist. No. 1*, 181 Wn. App. 326, 340-43, 325 P.3d 419 (2014); *see also King Cty. v. City of Algona*, 101 Wn.2d 789, 794, 681 P.2d 1281 (1984) ("Where the primary purpose in operating the transfer station ***is public or governmental in nature***, the county cannot be subject to the city B & O tax, absent express statutory authority." (emphasis added)). Here, the County is charging the Utilities for the use of its property for the provision of water and sewer services, which Washington courts consistently have held are proprietary functions. *See, e.g., Burns*, 161 Wn.2d at 155 ("In the erection and operation…of waterworks…a municipal corporation acts as a business concern." (quotations omitted)); *Hayes v. City of Vancouver*, 61 Wash. 536, 539, 112 P. 498 (1911) (operation of a sewer system is a proprietary function).[47] Accordingly, the

[47] In a footnote, the District Utilities incorrectly contend that, by allowing FMD to implement the Ordinance through rulemaking, the County unlawfully delegated taxing authority to FMD. *See* District Utilities' Br. at 42 n.12. Again, because Franchise Rental Compensation is not a tax, no unlawful delegation of taxing authority occurred. Improper delegation applies to legislative functions, not proprietary functions such as the determination of franchise compensation. *See Municipality of Metro. Seattle v. Div. 587, Amalgamated Transit Union*, 118 Wn.2d 639, 648, 826 P.2d 167 (1992). The Ordinance also satisfies the requirements "(1) that the legislature has provided standards or guidelines which define in general terms what is to be done and the instrumentality or administrative body which is to accomplish it; and (2) that [p]rocedural safeguards exist to control arbitrary administrative action and any administrative abuse of discretionary power." *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 159, 500 P.2d 540 (1972). Regardless, the District Utilities present no argument on this issue and this Court should therefore decline to review it. *See State v. Thomas*, 150 Wn.2d 821, 868-

governmental immunity doctrine is inapplicable on this additional ground.

F. THE ORDINANCE'S INDEMNITY PROVISION IS VALID.

Ordinance 18403, Section 7.C.2 provides that grantees of water utility franchises "shall, at no expense to the county, provide fire suppression water facilities and services…and shall indemnify, defend and hold harmless the county against damages arising from fire suppression activities during fire events." CP 273. The clause tracks RCW 70.315.060(3), which authorizes inclusion of indemnification provisions in franchise agreements.[48] *See* CP 2038. The Utilities allege that by mandating inclusion of the indemnity clause in the County's franchise agreements, Section 7.C.2 violates RCW 70.315.060(3), which provides that counties and water purveyors may "mutually agree" to include such provisions. The trial court did not reach this argument, but it fails.

69, 83 P.3d 970 (2004) (this Court "will not review issues for which inadequate argument has been briefed or only passing treatment has been made.").

[48] Committee reports available for RCW 70.315.060 confirm the intent of the statute. *See* Wash. Comm. Rep. on HB 1512, 63rd Leg., Reg. Sess. (May 3, 2013) ("Consistent with applicable statute, agreements or franchises may include indemnification, hold harmless, or other risk management provisions under which purveyors may indemnify and hold harmless cities, towns, and counties against damages arising from fire suppression activities."); *see also* Wash. Comm. Rep. on HB 1512, 63rd Leg., Reg. Sess. (Apr. 1, 2013) ("Municipal and nonmunicipal purveyors are not liable for any damages that arise out of a fire event, relating to the operation, maintenance, and provision of fire suppression water facilities and services, under certain circumstances. Consistent with applicable statute, agreements or franchises may include indemnification, hold harmless, or other risk management provisions under which purveyors may indemnify and hold harmless cities, towns, and counties against damages arising from fire suppression activities.").

Nothing in the Ordinance compels utilities to enter franchise agreements with the County and nothing in RCW 36.55.010 prohibits the County from requiring certain minimum terms and conditions when it grants a franchise. *See City of Spokane*, 175 Wash. at 107. As noted above, utilities may choose to locate their facilities outside the County's ROW rather than enter into a franchise agreement. *See City of Everett*, 97 Wash. at 267. While the County negotiates all terms of franchise agreements, here the County Council has determined that terms related to responsibility and indemnity for fire suppression facilities and services are critical. *See* CP 2039.[49] The County further expects that utilities may make certain requests in the negotiation to offset these requirements. *Id*.[50]

Finally, though valid, Ordinance 18403's indemnification provision is irrelevant to the County's authority to charge rental compensation in conjunction with the grant of a franchise. Accordingly, the remainder of the Ordinance remains valid in either event.

III. CONCLUSION

The County respectfully requests that this Court reverse the trial court, and reinstate the Ordinance and Rule in full.

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[49] Because the County is uninvolved with delivering fire suppression, the risk associated should be borne by the responsible utilities. *See* CP 2039.

[50] Further, utilities may receive a credit against their franchise rental compensation for costs incurred by the utilities for fire suppression facilities and services. *See* CP 2039; *see also* CP 273 (Ordinance 18403, § 7.C.2).

RESPECTFULLY SUBMITTED this 26th day of July, 2019.

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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, over the age of 21 years, and not a party to this action. On the 26th day of July, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon the parties listed below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of July, 2019.

Sydney Henderson

PACIFICA LAW GROUP

July 26, 2019 - 4:53 PM

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